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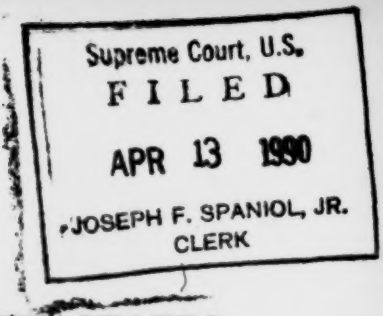

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GLEN E. MOERING and MYRTLE P. MOERING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In this Civil Enforcement of Internal Revenue Service Third Party Summons case, Petitioners' Constitutional Rights of Privacy and Due Process were violated. The District Court failed to protect petitioners' rights when it refused an evidentiary hearing and allowed production of personal bank records including searches of safe deposit boxes.

The questions presented are:

1. Is the case of *U.S. v. Boyd*, 116 U.S. 616 (1886), invalidating a self executing criminal summons statute to be followed?

2. Did the Right to Financial Privacy Act of 1978 (P.L.95-630, 1103, 92 Stat. 3697), restore the Fourth Amendment right to privacy in bank records?

3. When taxpayers received a tax refund for a year under investigation after the investigation was started, should the court have allowed at least a minimal evidentiary hearing?

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UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Glen E. Moering and Myrtle P. Moering respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on January 16, 1990.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not officially reported. It is set out at Appendix A to this Petition.

JURISDICTIONAL STATEMENT

The January 16, 1990 judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A) affirmed the action of the District Court refusing to quash the summons of the Internal Revenue Service for bank records of Petitioners. This Court's jurisdiction rests upon 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause. . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

Bank records are confidential. 12 U.S.C. 3403. Summons procedures without allowing even a minimal evidentiary hearing do not protect the confidentiality or unlawful search and seizure protection of the constitution.

STATEMENT OF THE CASE

Petitioners, pursuant to 26 U.S.C. 7609(h)(1), requested the District court to quash an Internal Revenue Service summons directed to three California banks seeking Petitioners bank records.

The Moerings alleged that the proceedings were solely criminal and sought an evidentiary hearing as they had received a refund of $13,666.00 for 1985, one of the years under investigation. No explanation accompanied the refund check. The Moerings also alleged that these and other facts were within the possession of the Internal Revenue Service and that without an evidentiary hearing "it will be impossible for Petitioners to meet their burden herein". (Petition to Quash attached as Appendix B at page 22).

REASONS FOR GRANTING THE WRIT

The United States Supreme Court in *United States v. Boyd*, 116 U.S. 616 (1886), held that a statute requiring invoices produced pursuant to a criminal enforcement summons was unconstitutional. All of the Supreme Court case law on this subject is prior to the enactment of 26 U.S.C. 7602(b), a statute allowing seizures of a taxpayer's records solely for criminal investigation. Boyd struck down a similar enactment as repugnant to the self incrimination protection of the Fifth Amendment and the unreasonable search and seizure laws of the Fourth Amendment. 26 U.S.C. 7602(b) eliminates the probable cause requirements as to criminal tax evasion. Safe deposit boxes should have greater protection than bank records. There is no reason why tax crime enforcement should have less safeguards than any other criminal investigation.

The Ninth Circuit Court of Appeals held that bank records were not private, relying on *United States v. Miller*, 425 U.S. 435 (1976). Miller was abrogated by the Right to Financial Privacy Act of 1978, Pub. L. 95-630, Sections 1100-1103, Title XI, 92 Stat. 3697, 12 U.S.C. 3402, November 10, 1978. *U.S. v. Frazin*, 780 F.2d 1461, 1465 (9th Cir. 1986). It is submitted that the prior holdings of Fourth Amendment rights to bank records should again be the law of the land. *Peterson v. Idaho First National Bank*, 367 P.2d 284 (Idaho 1961); *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974); *California Bankers Association v. Schultz*, 416 U.S. 21 (1974).

The Ninth Circuit decision here is in direct conflict with *United States v. Boyd*, 116 U.S. 616 (1886) and also in conflict with the State Court decisions.

The reasons for issuing a tax refund after the tax investigation has started are obviously only discoverable from the Internal Revenue Service as it issued the refund without explanation. Refusal of even a minimal evidentiary hearing denied the petitioners access to the necessary information to sustain the burden to quash the summons, hence constitu-

tional rights were violated. It is assumed that the Internal Revenue Service has not even a threshold basis for criminal investigation, hence the Fourth Amendment probable cause standard was violated.

Petitioners, in Appendix B, page 13 alleged a constitutional right of privacy in the records and violations of the search and seizure laws. They also alleged that no probable cause existed (Appendix B, page 12).

The District Court denied an evidentiary hearing and enforced the summons. The Ninth Circuit Court of Appeals on July 19, 1988 granted a stay pending appeal but affirmed the action of the District Court.

The result of the holding by the Ninth Circuit is that the Internal Revenue Service will under no circumstances be required to justify a search of confidential bank records or safe deposit boxes (Appendix B, page 13). The supervisory requirement of the Federal Courts over Federal Agency Summons power has been emasculated. Federal agencies will have unlimited and arbitrary search powers to all financial data without answering to any tribunal.

CONCLUSION

For the foregoing reasons, Petitioners, Glen and Myrtle Moering respectfully request this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and to modify or reverse the decision.

Respectfully Submitted,
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APPENDIX

APPENDIX A

Memorandum[1]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6158

GLEN E. AND MYRTLE P. MOERING,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted September 22, 1989[2]
Filed January 16, 1990

Before: FERGUSON, HALL, and KOZINSKI, Circuit Judges.

Appellants Glen and Myrtle Moering timely appeal the district court's order enforcing Internal Revenue Service (IRS) summonses. This court has jurisdiction under 28 U.S.C. 1291. We affirm.

[1]This disposition is not appropppriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2]This panel unanimously agrees that this case is appropriate for submission without oral agreement. Fed. R. App. p.34(a).

I.

In August 1987, the IRS issued summonses to the Maritime Bank of California, Commonwealth Bank, and International City Bank pursuant to an investigation of the Moerings' federal income tax liabilities, the correctness of their returns, and any possible criminal violations. The IRS gave the Moerings timely notice of the summonses, which requested the Moerings' bank records.

On September 15, 1987, the Moerings filed a petitioner to quash the summonses. In response, the IRS filed a petition for summary enforcement. The IRS petition was supported by declarations of two special agents of the Criminal Investigation Division who were involved in the investigation. After two hearings, the district court issued an order enforcing the summonses from which the Moerings appeal. This court granted the Moerings' motion to stay enforcement on the summonses pending appeal.

II.

We review the denial of a petition to quash an IRS summons under the clearly erroneous standard. Tornay v. United States, 840 F.2d 1424, 1426 (9th Cir. 1988). Whether enforcement of the summons violates constitutional rights is a question of law which we review de novo. Id. at 1429. The denial of a request for an evidentiary hearing is reviewed for abuse of discretion. United States v. Author Servs., Inc., 804 F.2d 1520, 1523 (9th Cir. 1986) (citation omitted), modified on other grounds, 811 F.2d 1264 (1987).

III.

The Moerings contend that enforcement of the summonses violates their Fourth Amendment rights because it allows for the unreasonable search of private records. We find this contention to be meritless.

Governmental investigative activities do not implicate an interest legitimately protected by the Fourth Amendment "unless there is an intrusion into a zone of privacy, into 'the security a man relies upon when he places himself or his property within a constitutionally protected area.' " United

States v. Miller, 425 U.S. 435 (1976) (quoting Hoffa v. United States, 385 U.S. 293 (1966)). In Miller, the Supreme Court held that the subpoena of bank records constitutes "no intrusion into any area in which . . . a protected Fourth Amendment interest" exists. Miller, 425 U.S. at 440; see also id. at 442 (stating that a bank customer has "no legitimate 'expectation of privacy' in [the] contents" of bank records). Thus, IRS summonses of bank records cannot violate the fourth amendment.[3]

The Moerings attempt to escape the Court's holding in Miller by arguing that the Right to Financial Privacy Act (the RFPA), 12 U.S.C. 3402, reversed Miller for all purposes. We are not persuaded by this argument. Congress enacted the RFPA not to reverse, but as a "response" to, Miller. In passing the statute, Congress intended to effectuate a "compromise between a bank customer's right of financial privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." United States v. Frazin, 780 F.2d 1461, 1465 (9th Cir.) (emphasis added), cert. denied, 479 U.S.839, cert. denied, 479 U.S. 844 (1986). The RFPA prohibits financial institutions from supplying the government with information about their customers' financial records unless the customer authorizes the disclosure of such information or the government obtains a valid subpoena or warrant. See 12 U.S.C. 3402. But the RFPA specifically exempts IRS summonses from the provisions of 3402 in 3413(c), which reads "[nothing] . . . prohibits the disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code." See also McTaggart v. United States, 570 F. Supp. 547, 550 (E.D. Mich. 1983) (3413(c) precludes a right of privacy in bank records).

---

[3]Appellants' reliance on Boyd v. United States, 116 U.S. 616 (1886), is misplaced. Boyd declared unconstitutional a statute requiring the respondent to produce a private paper or record, namely a business invoice. See id. at 638. The Miller Court specifically distinguished Boyd by stating that bank records are not "private" papers over which the respondent could assert either ownership or possession. Miller, 425 U.S. at 440.

The Moerings additionally argue that 7602(b) is unconstitutional because it allows for IRS investigations that are solely criminal in nature. But since the Moerings have no privacy interest in their bank records, whether 7602(b) provides for solely criminal investigations is irrelevant for purposes of fourth amendment analysis. Moreover, the prohibition on IRS summonses issued solely to aid criminal investigations, announced by the Supreme Court in United States v. LaSalle Nat'l Bank, 437 U.S. 298, 315–17 & n. 18 (1978), was found as a matter of statutory, not constitutional, construction. See id. The IRS in this case issued valid third party record-keeper summonses. See Harris v. United States, IRS, 758 F.2d 456, 457 (9th Cir. 1985) (citations omitted) (summonses issued to a third party record keeper pursuant to 7602 do not violate the Fourth Amendment).

IV.

The Moerings further contend that the district court erred in denying their motion for an evidentiary hearing because the facts allegedly show the IRS issued the summonses in bad faith.

To obtain enforcement, the IRS must demonstrate good faith in issuing the summonses. The IRS must make a prima facie showing that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed". United States v. Powell, 379 U.S. 48, 57–58 (1964). The IRS submitted the affidavit of Kenneth Bethke indicating that the summonses were issued in compliance with these four Powell factors. Accordingly, we find that the district court was not clearly erroneous in finding that the government has set forth a prima facie case. See Ponsford v. United States, 771 F.2d 1305, 1308 (9th Cir. 1985) (affidavits are the normal method by which the IRS makes a prima facie showing).

Since the IRS has met its burden, the Moerings now have the burden of proving an abuse of process by showing that the IRS has acted in bad faith for an improper purpose. See

Liberty Fin. Servs. v. United States, 778 F.2d 1390, 1392 (9th Cir. 1985) (per curiam). An abuse would take place if the IRS issues the summons " 'for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.' " United States v. Stuart, 109 S.Ct. 1183, 1188 (1989) (quoting Powell, 379 U.S. at 58). The district court found that the Moerings had made "only bald allegations" of bad faith that were insufficient to meet the burden necessary to warrant an evidentiary hearing. We find that the district court did not abuse its discretion.

In order to trigger a limited evidentiary hearing, the Moerings must " 'do more than allege an improper purpose'; 'some evidence' must be introduced to support the allegations made.' " United States v. Samuels, Kramer & Co., 712 F.2d 1342, 1347 (9th Cir. 1983) (quoting United States v. Church of Scientology, 520 F.2d 818, 824 (9th Cir. 1975)). This burden is a "heavy" one. Liberty Fin. Servs., 778 F.2d at 1392. The Moerings must answer the IRS's prima facie case " 'through responsive pleadings, supported by affidavits, that allege specific facts in rebuttal.' " Samuels, 712 F.2d at 1348 (quoting United States v. Kis, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982)). The facts, however, need only raise "sufficient doubt" about the government's purposes. Id.

We find that the Moerings have alleged no specific facts from which to infer a possibility of some wrongful conduct on the IRS's part. In attempting to show bad faith on the agency's part in conducting this particular investigation, they state only that the IRS's investigation of them must be "solely" criminal because (1) they received a refund for one of the relevant years and (2) there is only a criminal agent of the IRS on the case.

Preliminarily, we note that whether taxpayers can even attack the bad faith of the IRS by showing that a summons is being issued solely to aid a criminal investigation is now dubious. Admittedly, the Supreme Court in 1978 interpreted

7602 as preventing the issuance of a summons solely for a criminal investigation, see LaSalle, 437 U.S. at 316–17 & n. 18. This standard not only prohibited the use of an IRS summons once the agency refers a case to the Department of Justice for prosecution, id. at 311; it prohibited the issuance of a summons "when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution, "id. at 317. But Congress, in passing The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), appears to have amended 7602 in a manner that eliminated the second prong of the LaSalle holding, in effect allowing the IRS to issue a summons even solely for a criminal investigation so long as the agency has not referred the case to the Justice Department or has not received a written request from the Justice Department for a return or return information on the taxpayer. See 26 U.S.C. 7602(b) (authorizing IRS to use its summoning authority to investigate "any offense connected with the administration or enforcement of internal revenue laws") (emphasis added); id. 7602(c) (prohibiting IRS from issuing any summons when Justice Department referral is in effect). Congress advocated a "clear definition of when the power to issue an administrative summons exists" so as to avoid "wasteful litigation" on the question whether the IRS "has made an institutional decision to abandon pursuit of a civil tax determination or collection, or has made an institutional commitment to refer a case to the Justice Department." S. Rep. No. 494, 97th Cong., 2d Sess., Vol. 1, pt. 2, at 285, reprinted in 1982 U.S. Code Cong. & Admin. News 781, 1031. This is the position of the dissent in LaSalle, 439 U.S. at 320-21 (Stewart, J., dissenting). See Moutevelis v. United States, 727 F.2d 313, 314–15 (in adopting the "bright line" test urged by the dissenters in LaSalle, Congress "eliminated from consideration the question whether the Internal Revenue Service was motivated by a criminal investigative purpose, so long as no Justice Department referral has occurred"); see also United States v. Morgan, 761 F.2d 1009, 1012 (4th Cir. 1985) (Congress

drew a " 'bright line' " by which it "intended to establish a mechanical test for determining the validity of the summons").

Nonetheless, the Supreme Court has recently stated, somewhat cryptically, that Congress codified "the essence" of its LaSalle holding in TEFRA. Stuart, 109 S.Ct. at 1189. Additionally, one case in this circuit has noted the existence of the IRS's institutional responsibility subsequent to the enactment of the TEFRA amendments. See Author Servs., 804 F.2d at 1524. But even if these cases signal that the institutional responsibility claim still has some vitality in proving bad faith on the part of the IRS, we find that the Moerings have failed to show that the IRS has abandoned its "institutional responsibility" to "calculate and to collect civil fraud penalties and fraudulently report or unreported taxes." LaSalle, 437 U.S. at 314. Whether an investigation has "solely criminal purposes must be answered only by an examination of the institutional posture of the IRS" in each case. Id. at 315. A good-faith inquiry serves to determine whether the IRS in issuing the summons is "honestly pursuing the goals of 7602." Id. It does not focus on the personal intent of the special agent. Id. at 316. "Because criminal and civil fraud liabilities are coterminous, the [IRS] rarely will be found to have acted in bad faith by pursing the former." Id.

The fact that the Moerings have received a refund for 1985 does not preclude the IRS from investigating their civil tax liability for that year. See United States v. Wurts, 303 U.S. 414, 416 (1938); see also Woods v. United States, 724 F.2d 1444, 1448 (9th Cir. 1984) (government has authority to recover funds which its agents have wrongfully, erroneously, or illegally paid). Further, because the IRS did not make a recommendation to the Justice Department prior to issuing the summonses, we will not consider the summonses to be in bad faith "merely because the IRS is considering criminal prosecution." Kerr v. United States, 801 F.2d 1162, 1164 (9th Cir. 1986). Finally, the fact that only special agents have appeared in the investigation prior to the filing of the petition for enforcement is not enough to carry the Moerings' burden of showing that the investigation was wholly criminal in

purpose. See United States v. Doney, 559 F.2d 544, 545 (9th Cir. 1977) (per curiam) (citing Donaldson v. United States, 440 U.S. 517 (1971)). Because the Moerings have failed to raise sufficient doubts about the government's purpose in seeking enforcement of the summonses, we find that the district court did not err in denying their request for an evidentiary hearing.

VI.

Finally, the Moerings contend that the summonses are unenforceable because they are overbroad, general, oppressive, and burdensome. The district court ordered that the summonses be enforced, apparently finding that this contention lacked merit.

Congress has given the IRS "broad" investigative powers for enforcing the tax laws. Tornay, 840 F.2d at 1431 (citing 26 U.S.C. 7601). The IRS has the power to issue summonses for any material that is relevant or material to a tax investigation. 26 U.S.C. 7602(a)(1). To satisfy its burden, the IRS need only show that materials "'would throw light upon the correctness of the [Moerings'] returns.' " Stuart v. United States, 813 F.2d 243, 251 (9th Cir. 1987) (quoting United States v. Ryan, 455 F.2d 728, 733 (9th Cir. 1972)), rev'd on other grounds, 109 S.Ct. 1183 (1989). Since relevancy is an element of good faith, it may be established by affidavit. Id. When the IRS seeks information relevant to a legitimate investigation, it is not engaged in a "fishing expedition". Tiffany Fine Arts, Inc. v United States, 469 U.S. 310, 321 (1985).

The IRS is not engaged in a fishing expedition in the instant case. The summonses requested records "maintained for or on behalf of" the Moerings and several specified businesses. In addition, the summonses requested records of "any other known nominees or any accounts" on which the Moerings had signature authority, including but not limited to certain types of accounts, safety deposit boxes, and time certificates of deposit. The businesses named in the summonses are ones in which the Moerings are financially involved. All the requested information appears to relate to the Moerings' receipt or

disbursement of money, or to their financial or property transactions, which may be properly inspected by the IRS. See United States v. Popkin, 623 F.2d 108, 110 (9th Cir. 1980) (per curiam). Further, the information requested was limited to the period under investigation, from December 1, 1982 to January 31, 1986. Given the text of the summonses and the affidavit of Kenneth Bethke, we find that the materials will throw some light on the correctness of the Moerings' returns. Therefore, we find that the summonses are enforceable. Accordingly, the district court's order is

AFFIRMED.

APPENDIX B

Petition and Affidavit to Quash

Summons Pursuant to 26 USCA 7609,

7604(a) & (b); Including Citations of Authority

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 87-00101-AHS(GHK)X

GLEN E. MOERING and MYRTLE P. MOERING,
husband and wife,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petitioners, GLEN E. MOERING and MYRTLE P. MOERING hereby petition as follows:

I.

Petitioners

Petitioners are citizens of the United States of America, of adult age, residing at E. 5850 Mullan Trail Road, Coeur d'Alene, Idaho, within Kootenai County, Idaho.

II.

Respondent

The Respondent in this action is the UNITED STATES OF AMERICA.

III.

Jurisdiction

This is a motion to quash summons, arising out of the Internal Revenue Code of 1954, Title 26 U.S.C. Section 7604, 7605(b) and 7609(b)(2). This Court has jurisdiction in this action pursuant to I.R.C. Section 7604(a), (b) and 7609(h)(1).

IV.

Facts of Service

On September 4, 1987, Greg Moering, son of Petitioners, received mail from the United States Post Office, Coeur d'Alene, Idaho of the following listed summons apparently intended to be served on the banks listed by Kenneth Bethke, Special Agent, Criminal Investigation Division, Internal Revenue Service, Coeur d'Alene Idaho. Identical summons were addressed to each Petitioner and require appearances before Robert Passmore, an officer of the Internal Revenue Service.

4.1 September 4, 1987. Commonwealth Bank, Carson Regional Office, 17140 South Avalon Boulevard, Carson, California 90746. (Copy attached as Exhibit "A").

4.2 September 4, 1987. Maritime Bank of California, 131 West Anaheim Street, Wilmington, California. (Copy attached as Exhibit "B").

4.3 September 4, 1987. International City Bank, N.A., 780 Atlantic Avenue, Long Beach, California 90813.

4.4 Copies of the summonses were never furnished to Petitioners' attorney. Petitioners' attorney furnished a duly executed written Power of Attorney to Kenneth E. Bethke, Respondents' representative on July 20, 1987.

V.

Ownership Facts

The Petitioners fully or partially own interests and are officers, directors, stockholders, partners, trustees or beneficiaries in the following entities:

5.1 Pacific States Groth Associates, Inc.

5.2 GGGGSS, Inc.

5.3 G's on the Green

5.4 Poppy's

5.5 Man's World, Inc.

5.6 Poppy's Smoker

5.7 Poppy's Original Pantry

5.8 Poppy's Family Restaurant

5.9 M's Family Restaurant

5.10 These designations are taken from Respondent's allegations and may or may not be totally accurate.

The Internal Revenue Service is attempting to gain information on these entities. All of these entities are associated with Petitioners' businesses.

VI.

Action Requested, Conduct of Internal Revenue Service

Petitioners move to set aside and quash the summonses listed in paragraph 4 of this petition and any other summons that may be later served on the Petitioners that may be related to this action on the following grounds:

6.1 That in fact and law and pursuant to the standards set forth in U.S. v. Powell, 379 U.S. 48 (1964) and U.S. v. LaSalle National Bank, 437 U.S. 298 (1978), the Internal Revenue Service has fully, finally and completely abandoned the civil rights in an institutional sense and posture thereby all of the summonses were issued in bad faith; constitute harassment, abuse of process and wrongfully and intentionally fail to follow established law and procedures of Section 26 USCA 7602 through 7609. The summonses were also not issued for any legitimate purpose as the Internal Revenue Service issued them for exploratory reasons and not for specific reasons.

6.2 The material sought is not relevant to the determination of civil liability for additional tax.

6.3.4 The summons also request that "all records pertaining to the accounts".

6.4 The material asked for and outlined in 6.4.1 is totally irrelevant to any tax investigations. In addition, since the signatures of the Petitioners are needed to gain entry into any boxes, if in fact safety deposits are rented, constitutes a violation of the Fourth Amendment of the United States Constitution regarding illegal searches and seizures.

6.5 The materials sought in 6.4.2 through 6.4.4 and the summons as a whole, clearly indicate that the Respondent is exploring for records and has no proper purposes to summons all possible information whether relevant or not in the hope that some of the information may have possible information or indicate that a crime has been committed. The summons has no limiting scope nor does the Respondent have any evidence of any materiality. Both of the summons are well within the "fishing expeditions" prohibited by the U.s. Constitution. Federal Trade Commission v. Lorillard, 264 U.S. 298, 68 L.Ed 696 (1924); U.S. v. Bisceglia, 420 U.S. 141, 43 L.Ed 2nd 88 on 93-4 (1975).

6.6 The summonses in all the cases are overbroad and pertain to years which are barred by the statute of limitations. United States v. Goldman, 637 F.2d 664 on 666 (9th Cir. 1980); U.S. v. Powell, 379 U.S. 48 (1964).

6.7 The summonses request information in addition to receipts or disbursements of money and must be modified, even if enforceable as to these items. U.S. v. Popkin, 623 F.2d 108, 109 (9th Cir. 1980).

6.8 All of the information sought is protected by Petitioners right against illegal search and seizure and self incrimination protected by the Fourth and Fifth Amendments to the U.S. Constitution.

6.9 Petitioners further allege that no possible civil purpose exists for the summonses as civil matters are completely beyond any possible civil audit purpose. The investigation is

solely and completely for a criminal purpose and as such a usurpation of the power vested in the Federal Grand Jury and United States District Court.

6.10 The Respondent and the Internal Revenue Service have not shown Petitioners in any way that there is any indication of fraud in any return. U.S. v. Powell, 325 F.2d 914 (3rd Cir. 1963).

6.11 Petitioner asserts on information and belief that the bank alleged in Paragraph IV above are within the third party record-keeping rules of 26 USCA 7609 and have been contacted but the administrative rules have not been followed.

6.12 The Petitioners counsel has not been notified of the summons despite a Power of Attorney; thereby due process of law, right to counsel, and other constitutional rights have been denied these Petitioners by Respondents.

VII.

Discovery - Evidentiary Hearing

The Petitioners are under a procedurally difficult burden of proof and request an evidentiary hearing as allowed by necessity under Section 81(a)(3) of the Federal Rules of Civil Procedure as access is needed to testimony and records of Agent Kenneth E. Bethke of the Criminal Investigation Division of the Internal Revenue Service and others who are working on this case. Without such inquiry it will be impossible for Petitioners to meet their burden herein. In addition the additional persons who have been summoned without notice to Petitioners need to be ascertained and reviewed.

Petitioners further request that depositions of the persons stated be allowed and the discovery be recorded by a Court Reporter or Certified shorthand Reporter prior to any submission or argument on any motion for dismissal.

Petitioners have alleged facts clearly establishing bad faith, improper purpose and wrongdoing on the part of the Internal Revenue Service allowing an evidentiary hearing. U.S. v. Stuckey, 646 F.2d 1369 (9th Cir. 1981); U.S. v. Genser

(Genser II), 595 F.2d 146 (3rd Cir. 1979); U.S. Marine Midland Bank, 585 F.2d 36 (1978).

This Petition is also based on the Affidavit of Robert E. Kovacevich, attached hereto.

VIII.

Prayer for Relief

WHEREFORE, Petitioners pray as follows:

8.1 That the court quash all the summonses listed in paragraph 4 herein.

8.2 That the court modify the demands or quash any one or more of the specific listed summonses in 4 herein.

8.3 That the Court quash any summonses determined to be within the third party recordkeeping rules where the proper procedure was not followed or any other yet undiscovered summonses now unknown to Petitioners; which are served for an improper purpose and which may be discovered as this proceeding progresses.

8.4 That the court allow pre-hearing discovery of Kenneth E. Bethke, Special Agent, Criminal Investigation Division, Internal Revenue Service or other persons who are working on this case.

8.5 That the court set an evidentiary hearing on this matter.

8.6 That the court allow for attorneys fees and costs pursuant to 28 USCA 2412 and 26 USCA 7430.

8.7 For any and all other relief allowable to the Petitioners in this proceeding.

DATED this 14th day of September, 1987.

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